Chang et al v. Virgin Mobile USA LLC et al Doc. 54

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SUSAN CHANG, AS NEXT FRIEND OF ALISON CHANG, A MINOR, AND JUSTIN HO-WEE WONG, Plaintiffs, V. VIRGIN MOBILE PTY, LTD., Defendant.	§ § § § § § § § § § §	C.A. No. 3-07-CV-01767-ECF

APPENDIX IN SUPPORT OF DEFENDANT VIRGIN MOBILE PTY, LTD.'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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Deposition of David Cain taken on April 23, 2008	APP 5-37

Respectfully submitted,

BAKER & McKENZIE LLP

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CERTIFICATE OF SERVICE

I hereby certify that, on the 8th day of August 2008, I electronically filed the foregoing "Appendix in support of Defendant Virgin Mobile (Australia) Pty, Ltd.'s Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss" with the Clerk of Court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means:

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SUSAN CHANG, AS NEXT FRIEND OF ALISON CHANG, A MINOR, AND JUSTIN HO-WEE WONG,	§	
Plaintiffs,	§	C.A. No. 3-07-CV-01767-ECF
V.	§	
VIRGIN MOBILE PTY, LTD.,	§	
Defendant.	§	

DECLARATION OF MYALL S. HAWKINS IN SUPPORT OF DEFENDANT VIRGIN MOBILE PTY, LTD.'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

I, Myall S. Hawkins, declare and state as follows:

1. My name is Myall S. Hawkins. I am a partner with the firm of Baker & McKenzie LLP. Our firm represents Defendant Virgin Mobile Pty, Ltd. in the above-captioned suit. This Declaration is submitted in support of Defendant Virgin Mobile Pty, Ltd.'s Reply to Plaintiffs' Opposition to Defendant's Motion to Dismiss.

2. I am over the age of twenty-one (21) and am competent to make this Declaration. I have personal knowledge of the facts stated herein.

3. Attached to Defendant's Appendix is a true and correct copy of excerpts from a Flickr.com discussion blog entry entitled, "Dump Your Pen Friend on Flickr – Photo Sharing" in May 2007 by Plaintiffs A.C. ("aleeviation") and Justin Ho-Yee Wong ("chewywong"). A.C's brother's, Damon Chong's, numerous postings (teacherjamesdotcom) have been excluded for the sake of brevity and being cumulative in nature. APP 3-4.

4. Attached to Defendant's Appendix is a true and correct copy of the deposition of David Cain that was taken on April 23, 2008. APP 5-37.

I declare under penalty of perjury that the foregoing is true and correct.

Date: August 8, 2008

Myall S. Hawkins

HOUDMS/234614.1

flickr

Home The Tour Sign Up Explore

Dump Your Pen Friend

DUMP YOUR
PEN FRIEND

Saw this while I was walking into the city earlier today - down in the bottom corner it says that the photo is from flickr.com/photos/chewywong.

I wonder if he knows that his photo is being used here (most of his photos seem to be using a Creative Commons Attribution license). Anyway - congratulations!

For clarification, this is an advertising campaign being ran by Virgin Mobile in Australia. There have been sightings of these billboards containing photos from Flickr in both Melbourne (Victoria, Australia) and Adelaide (South Australia, Australia).

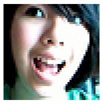
There is a post in the FlickrCentral group about this photo - www.flickr.com/groups/central/discuss/72157600541608353/

This photo has notes. Move your mouse over the photo to see them.

Comments

< Prev **1** 2 3 Next >

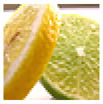
(248 comments)



aleeviation says:

hey that's me! no joke. i think i'm being insulted...can you tell me where this was taken.

Posted 5 months ago. (permalink)



chewywong pro says:

where was this? do you think virgin mobile will give me stuff?

Posted 5 months ago. (permalink)

COPY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISON

SUSAN CHANG, as Next Friend)
of Alison Chang, a minor, And)
Justin Ho-Wee Wong)
)
Plaintiffs) Cause No. 3:07-CV-01767
)
v.)
)
Virgin Mobile Pty Ltd)
)
Defendant)
)
)

Pursuant to Rule 30(b)(6),
Federal Rules of Civil Procedure

VIDEOTAPED VIDEOCONFERENCE
DEPOSITION OF DAVID CAIN

Taken at: Baker & McKenzie
Level 27, AMP Centre
50 Bridge Street
Sydney, NSW, 2000
Australia

On: Wednesday, April 23, 2008 at 10.28am

Reporter: Judith White, JP 184396

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Videographer:
Mr Wayne Matthews
National Court Reporters, Inc

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THE VIDEOGRAPHER: This is videotape number 1 in the deposition of David Cain in the matter of Susan Chang, as Next Friend of Alison Chang, a minor, And Justin Ho-Wee Wong v Virgin Mobile Pty Limited in the United States District Court, Northern District of Texas, Dallas Division. The case number is cause no. 3:07-CV-01767. Today's date is the 23rd of April 2008 and the time on the video monitor is 10.28am.

The videographer today is Wayne Matthews from National Court Reporters of Cleveland, Ohio, and this video deposition is taking place at level 27, 50 Bridge Street, Sydney, Australia.

Would counsel please identify yourselves and state whom you represent.

MR FITTS: My name is Bryant Fitts from the law firm of Fitts & Zehl. I'm here for the plaintiffs.

MR ZEHL: My name is Ryan Zehl and I am also with Fitts Zehl. I represent the plaintiffs.

MR HAWKINS: Myall Hawkins from Baker & McKenzie representing the defendant.

THE VIDEOGRAPHER: In Sydney.

MR STEWART: Andrew Stewart, Baker & McKenzie for the defendant.

MR BOURGET: Marcus Bourget. Corporate counsel Virgin Mobile Australia.

THE VIDEOGRAPHER: The court reporter today is Judith White from the firm of National Court Reporters of Cleveland, Ohio. Would the Justice of the Peace, Judith White, please swear in the witness.

DAVID CAIN,

having been duly affirmed, testified as follows:

THE VIDEOGRAPHER: Proceed, gentlemen.

BY MR ZEHL:

Q. Okay. Mr Cain, my name is Ryan Zehl and, as I stated earlier, I represent the plaintiffs in this case. Do you understand - Mr Cain, do you understand why we're here today, that we're involved in a lawsuit against Virgin Mobile?

A. Yes, I do.

Q. Okay. Mr Cain, have you ever been in a deposition before?

A. No, I haven't.

Q. Okay. I - I'm going to just give you a couple of general rules, just to make this easier. As you'll notice, there is some delay between my questions - well, there's a delay after my questions. If you wouldn't mind just waiting a couple of seconds before you answer so that there's no communication problems.

A. Yes, okay.

Q. Okay. And if you don't understand something that I'm saying to you, if you don't understand my question, if you just simply tell me, I'll rephrase it so that hopefully you'll understand.

A. Okay. I understand.

Q. Okay. And if - if you answer a question, I will just assume that you do understand it, if that's okay with you.

A. Okay. I understand.

Q. And if you need a break, just let me know and after we're done with the question I'll see what we can do about taking a break.

A. Okay.

Q. And if you need to consult with your attorney at any time, I ask that if we're in the middle of a question you wait until you've answered the question and then break to speak with your attorney.

A. Okay.

Q. Okay. Now, I - I'm going to just ask you a couple of questions I ask everybody. Is there any reason, because of sickness or any medications or drugs that you're currently taking, that you're unable to answer or understand any questions that I may ask of you today?

A. No.

Q. Okay. Mr Cain, how old are you?

A. Thirty-four years old.

Q. Okay. Did you grow up in Australia?

A. Yes.

Q. Have you lived there your whole life?

A. That's correct, yes.

Q. Okay. Did you go to high school in Australia?

A. Yes.

Q. Okay. Did you go to university as well in Australia?

A. Yes and yes.

Q. Okay. Which university did you go to?

A. Sydney University.

Q. Okay. Did you have a major or a particular area of study while you were at Sydney University?

A. I did a Bachelor of Commerce with majors in marketing and finance.

Q. Okay. When you graduated from the university, did you go to any post-graduate school?

A. No.

Q. Okay. After graduation, did you immediately begin working?

A. Yes.

Q. And which company did you start working for after graduation?

A. I worked for Macquarie Bank.

Q. And approximately when was that? What year was that?

A. Early 1998.

Q. Okay. And what did you do for that company?

A. Administration.

Q. Administration, okay. How long were you with Macquarie Bank?

A. Three months.

Q. And then who did you work for next?

A. I started my own business.

Q. Okay. What did you do - what - what was your business called and - and what did you do?

A. It was called Latent Marketing, and I was attempting to start a backpackers' magazine.

Q. Did - did you ultimately start it or did you just attempt to start it?

A. Oh, I started it, but after 12 months I still hadn't launched one issue of the magazine, so I stopped.

Q. Okay. After - after your stint with that magazine, did you go work for somebody after that?

A. Yes.

Q. And - and who was that?

A. Southern Pacific Hotels, which was --

Q. Okay. In approximately what year did you start working for the hotel company?

A. It was towards the end of '99. I'd say September/October.

Q. Okay. Okay. Did you do marketing for them or did you do something else?

A. I was in the marketing department.

Q. Okay. What was your role in the marketing department?

A. I looked after their loyalty program, Pacific Privileges.

Q. Okay. Loyalty program. Is that - is that like a frequent guest program?

A. Yeah, that's correct.

Q. Okay. How - and how long were you with the hotel company?

A. A little over 12 months.

Q. Okay. And who did you work for when you left?

A. I went to work for a company called Global Loyalty.

Q. Okay. And how long were you with Global Loyalty?

A. Approximately two years.

Q. And did you also do marketing for Global Loyalty?

A. Yes.

Q. Okay. When - after your two years at

Global Loyalty, did you then join Virgin Mobile?
A. That's correct.
Q. Okay. In what year did you join Virgin Mobile?
A. I began - started work as a contractor in 2003 and became full time that year as well.
Q. Okay. Can you tell me what you did as a contractor?
A. I was looking after the retention program, so - yep.
Q. What - what is the retention program?
A. So customers who are with Virgin Mobile, trying to get them to stay with Virgin Mobile.
Q. Okay. How many positions have you held since you worked as a contractor?
A. Two positions.
Q. Okay. Can you tell me what those positions are and - and describe your job responsibilities, please?
A. Well, I was loyalty manager to start with, which was the title I was given when I moved to full time, looking after the retention program still. Then I moved to brand and communications manager, where I look after essentially big advertising campaigns.
Q. And are you now the brand communications manager?
A. Yes.

Q. How long have you served in this role as brand communication manager?
A. Well, since the end of 2003.
Q. Okay. So from 2003 to the present day?
A. That's correct.
Q. You said that you're responsible for big advertising campaigns - is that right - as the brand communications manager?
A. That's correct.
Q. Approximately how many campaigns would you say you've been responsible for since you started in your role as brand communications manager?
A. I'd say between - between six and eight.
Q. Between six and eight?
A. Mmm-hmm.
Q. What was your most recent campaign?
A. Most recent campaign was the launch of Virgin Broadband last August.
Q. Okay. When did you launch the "Are you with us or what?" campaign?
A. In May of last year.
Q. Okay. And - and approximately how long did that campaign last - last?
A. I think it was roughly middle of May to the end of July.

Q. Okay. So a little over two months?
A. Yep.
Q. Mr Cain, do you - are you paid by Virgin Mobile?
A. Yes.
Q. Do you have any employment contract with Virgin Mobile?
A. Yes, I believe so.
Q. Do you - when - when you are paid by Virgin Mobile, do you receive a cheque or is the money just deposited in your account electronically?
A. Bank deposit monthly.
Q. And do you know who deposits those funds in your account, which company?
A. Virgin Mobile.
Q. Okay. Who's the - do you know who the president is or CEO of Virgin Mobile?
A. Yes.
Q. Who is that?
A. His name is Matt Davey.
Q. And is he the CEO or the president or both?
A. CEO.
Q. Okay. Do you know who any of the directors or officers of the company are?
A. Yes.
Q. Can you identify those officers or directors that you are aware of, please?
A. The sales director's name is Geoff Hester, the marketing director's name is John Bradshaw, the customer service director's name is Rob Tihanyi, the finance director's name is Barbara - and her last name escapes me at this second - at this second, and there's an operations director, I think his name is Keir. I don't know his last name at this time either - Preedy.
Q. Okay. Thanks, Mr Cain. Do you report to the marketing director?
A. Yes.
Q. Would - would it be fair to say that the marketing director is your boss?
A. Yes.
Q. And over - over your five or so years at the company in the role that you're currently in, you said you have been responsible for about six or eight advertising campaigns; that's right? Correct?
A. Yes.
Q. Who is responsible for designing the campaigns?
A. Our advertising vendors.
Q. Okay. Your advertising vendors?
A. Mmm-hmm.
Q. Who - and who are your advertising vendors?

A. Primarily Host.
Q. Anyone else?
A. Not of any consequence, no.
Q. Not of any consequence. Have you worked with any other advertising vendors besides Host?
A. Yes.
Q. Can you identify those for me?
A. There's a company called Faster Louder which helped us advertise a music event last year.
Q. Okay. Is that the only other one?
A. There's another company called Modular, and they also advertised that - helped us advertise that same music event the year before.
Q. What about with your TV and radio campaigns? Which vendors do you work with in conjunction with those types of campaigns?
A. Host is in charge of all of our television campaigns.
Q. Have they been in charge of your television campaigns since you joined the company --
A. Yes.
Q. -- or - or began acting as the brand director?
A. Yes.
Q. Okay. Do you know approximately how long Virgin Mobile has worked - worked with Host?

A. Yes. Since launch.
Q. Since launch of what?
A. Sorry, the launch of --
Q. The company?
A. Yes, seven years. Over seven years.
Q. Okay. Okay. How does Virgin Mobile compensate Host? Do they compensate Host for their advertising services?
A. Yes.
Q. And do they do - do they do so by hour or by project or per year?
A. It's a combination of by hour and by project.
Q. Okay. I'm going to ask you some questions now about the "Are you with us or what?" campaign. Are you familiar with that campaign?
A. Yes.
Q. Were you responsible for that campaign?
MR HAWKINS: Object. Form.
THE WITNESS: Yeah, what do you mean by "responsible"?
BY MR ZEHL:
Q. Who - who at Virgin Mobile was responsible for that campaign?
MR HAWKINS: Same objection.
THE WITNESS: Again, there's - a lot of people are

responsible for the campaign.
BY MR ZEHL:
Q. Okay. Who at Virgin Mobile came up with the idea for the campaign?
A. No-one at Virgin Mobile came up with the idea.
Q. Okay. Who at Virgin Mobile decided to promote Virgin Mobile products in conjunction with the campaign?
A. The brand department.
Q. And are you in the brand department?
A. Yes.
Q. Are you the head of the brand department?
A. At this present time, yes.
Q. At the time of the campaign, were you the head of the brand department?
A. No, I wasn't.
Q. Okay. Who was the head of the brand department at that time?
A. Richard Field.
Q. Where is Richard Field now?
A. He lives in South Africa.
Q. Does he no longer work for Virgin Mobile?
A. No, he doesn't work for Virgin Mobile.
Q. Were you working in the brand department during the "Are you with us or what?" campaign?
A. Yes, I was.

Q. What was your role at that time?
A. To oversee the execution of advertising campaigns.
Q. Okay. Can you tell me why the former director of the brand department has left?
A. I don't know.
Q. Do you know when he left?
A. Yes.
Q. When was that?
A. December 28 last year.
Q. Of 2007?
A. Yes, that's correct.
Q. Okay. Were there any campaigns between the "Are you with us or what?" campaign and the time that the former director left the company?
A. Yes.
Q. Which campaigns were those?
A. The Virgin Broadband launch.
Q. Okay. Is that the only one?
A. Yes. There were - yes.
Q. Okay. Can you explain to me what your involvement was with the "Are you with us or what?" campaign?
A. My involvement was to work with outside - our outside advertising vendor, Host, in order to get an

advertising campaign to market.
Q. To market what?
A. To market free text Virgin to Virgin.
Q. Okay. So who approached Host about promoting free text messages?
A. Myself and Rich Field had a meeting with Host.
Q. Okay. And can you tell me, based on your observations and presence at that meeting, what was discussed during the meeting?
A. We told them that we had a new product which was we were offering free text to all Virgin Mobile customers when they text - send a text message to another Virgin Mobile customer. So we asked them to come up with an advertising campaign to sell that product.
Q. Okay. Can you - I'm sorry, I didn't write it down. What was the name of the former director again?
A. He - his title was brand general manager, I think you're referring to. His name was Richard Field.
Q. Okay. Thank you. And during this meeting, what instructions did you give to Host to help them assist Virgin Mobile with this campaign?
A. We asked to come - for them to come up with a range of concepts, advertising concepts, which would help people understand that if they were with Virgin Mobile that they could send another text message - send a text message to another Virgin Mobile customer for free.
Q. Okay. Did you instruct - did you give them any specific guidelines on what kind of concepts to come up with or what slogans to use, what kind of images to use?
A. No. The only - the only instruction - the only instruction was that it had to be within the "Are you with us or what?" guidelines.
Q. Okay. And what were the "Are you with us or what?" guidelines?
A. All it is is that it has to pose an opinion and then make it obvious which - of which part of that - of - of where - of where Virgin Mobile stood on that opinion.
Q. Okay. And it would be people that were projecting this opinion; is that right?
A. That wasn't in the brief, no.
Q. So animals could express opinions?
A. I can't - I don't - can't answer that. I - I don't know.
Q. So is it - was it not implicit to your marketing campaign that a person project the opinion?
MR HAWKINS: Object. Form.
THE WITNESS: It wasn't explicit.
BY MR ZEHL:
Q. Implicit?
A. It wasn't implicit.

MR HAWKINS: Same objection.
BY MR ZEHL:
Q. Okay. When you asked them to design these concepts, would they then come back to you or somebody within the brand marketing department with their ideas?
A. That's correct.
Q. And approximately how many times would you say they came back to you with different ideas before you selected the images and text that would be used in the "Are you with us or what?" campaign.
MR HAWKINS: Object. Form. Let me check, when you - when you're saying "ideas", are you talking about a concept or are you talking about a finished product?
MR ZEHL: A concept.
MR HAWKINS: Okay.
BY MR ZEHL:
Q. How many concepts - I'll repeat. How many concepts did they offer to you before you launched the campaign?
A. There was three concepts originally.
Q. Okay. And did you eventually choose one of those concepts?
A. Yes.
Q. Who was it that made the decision to choose the concept - was it you or was it Richard?
A. Rich and I both decided, in consultation.
Q. Okay. Can you - can you briefly describe what those three concepts that they recommended to you entailed?
A. I can tell you the first concept involved a number of images of people and parts of people, people's hands, objects, glasses of beer or - and they had text over the top of them in the form of an opinion and a logo. It was a series of - of print advertisements that all followed that same sort of structure. At - at this time I can't remember what the other two concepts were.
Q. Okay. Was the concept that you just described to me the concept that was ultimately chosen --
A. Yes.
Q. -- for the "Are you with us or what?" campaign?
A. Yes, that's correct.
Q. Okay. Did you have - okay. Did you have a - how well - I'll strike what I said. How well did you know Richard?
A. Yeah, he was a friend and a work colleague. Yeah, I knew him quite well.
Q. Did you know him before you joined Virgin Mobile?
A. No.
Q. Okay. Do you know where Richard was from?

A. Where he worked or where he was born?
Q. Where - where he was - where he was born, where he grew up?
A. South Africa.
Q. Okay. And you tell me that you were friends from working together at Virgin Mobile; is that correct?
A. Yes.
Q. And before he left, he never indicated to you why he was leaving; is that correct?
A. He said a couple of things, but I don't know exactly why.
Q. Do you recall anything that he said to you?
A. One thing he mentioned was his - he wanted his kids to grow up in South Africa.
Q. Okay. Anything else?
A. He missed South Africa.
Q. Okay. Anything else?
A. Not that I can recall.
Q. Have you spoken with Richard since he left the company?
A. Yes.
Q. And during any of those conversations, he never explained to you why he left Virgin Mobile?
A. No.
Q. Do you know if he was fired?

A. I know he wasn't fired.
Q. So you know he voluntarily left the company?
A. Yes. He was - he was also - he was a contractor. He was on contract. So he decided to leave.
Q. How long was he on contract with Virgin Mobile, do you know?
A. I would be guessing if I - it was - a rough - less than two years.
Q. Okay. Do you know who his employer was then, if he was on contract?
A. Virgin Mobile.
Q. So Virgin Mobile, if I understand correctly, has contract employees and permanent employees?
A. Yeah, that's correct.
Q. And can you briefly tell me the difference between the two, based on your experience as a contractor?
A. You get more money as a contractor and you've got less security, you don't get sick leave or superannuation if you're a contractor. Otherwise, I - yeah, that's all I know.
Q. So if - if somebody could choose, being a contractor is preferable?
A. Each to their own.
Q. Okay. Now, with - going back to these concepts

that you discussed - that you discussed with Host, the three different concepts, you said you remember the first one - that's right? Correct?
A. Yes, that's correct.
Q. But you don't - you don't remember the other two?
A. Not off the top of my head.
Q. But they all, did you say, involved images of people expressing opinions?
A. No.
Q. Just the first one?
A. Yes.
Q. And do you remember when, approximately, this meeting with Host took place?
A. Early January - the first meeting took place early January 2007.
Q. And how many meetings did you have since the January meeting and before the launch of the campaign?
A. Approximately eight meetings, I would say.
Q. And can you generally tell me what the purpose was of those meetings?
A. To start with, we tell them what we wanted them to do, they would come back with a number of routes, a number of concepts. We would narrow down the concept. Once we finalised a concept, we would narrow down the creative components and then finalise the components.
Q. Okay. So they would provide you with concepts and you would, over time, choose the ones you liked and ultimately you picked one of them; is that correct?
A. Yes.
Q. Okay. So Host was working at the instruction of Virgin Mobile?
A. Yes.
MR HAWKINS: Object. Form.
BY MR ZEHL:
Q. Okay. Can you tell me, if you recall, did all three concepts involve the use of a Creative Commons licence?
A. I can't remember what the other two were exactly.
Q. Did the first concept involve the use of this licence?
A. Are you asking me if it ultimately involved the use of it?
Q. Yes.
A. At launch, it --
MR HAWKINS: Mr Cain - Mr Cain, one of the questions he's got is - is what - you're saying at the time - at the time, or later he learned?

MR ZEHL: No.

Q. Did the concept ultimately involve the use of a Creative Commons licence?

MR HAWKINS: At any point in time did you learn that?

THE WITNESS: Yes.

BY MR ZEHL:

Q. When did you first learn that the concept involved the use of a Creative Commons licence?

A. I - I learnt - the first time I learnt was after returning from holidays, or vacation, and that was in the end of May 2007.

Q. And when did the campaign launch, again?

A. The middle of May 2007.

Q. So it was not until the campaign had already launched that you learned it involved the use of a Creative Commons licence?

A. That's correct.

Q. How long were you on vacation?

A. Approximately three weeks.

Q. So approximately from the beginning of May, from before when the campaign launched, until after the campaign launched you were on vacation?

A. I was away the date the campaign launched, yes.

Q. Okay. Could Host launch a campaign without first telling you or somebody else at Virgin Mobile that the campaign involved the use of a Creative Commons licence?

A. Yes.

Q. So did they not have to inform you of the details of the campaign before launching it?

A. Not all the details.

Q. Well, which details were important?

A. That - there's many details that are important.

Q. Okay. So you, as working - working in conjunction with the head of the brand marketing department, at no time knew that these ads involved the use of a Creative Commons licence; that's correct?

A. When you say "at no time", do you mean before the launch?

Q. At no time - yes, at no time before the launch.

A. I - I was not aware that there was a Creative Commons licence before I went on holidays.

Q. Do you know what a - did you know before you went on the holidays what a Creative Commons licence was?

A. No.

Q. Have you ever - had you ever heard of it before --

A. I'd never --

Q. -- the launch of the campaign?

A. I'd never heard of it before.
Q. Okay. Do you know if Richard was aware that the campaign involved the use of a Creative Commons licence, from your interactions with him?
A. At what time? Before the launch?
Q. Yes.
A. I don't know.
Q. Okay. During your discussions with Host, when was it presented to you that they would be using amateur photographs - amateur pictures rather than professional pictures?
A. Sorry, could you just repeat the question then?
Q. At what point in time did you learn that the campaign would be using amateur photographs and not professional models?
A. At the - the concept stage, when there were three concepts still.
Q. Okay. So at the early stages of the campaign; is that correct?
A. Yes.
Q. And did you or somebody at Virgin Mobile tell Host that you wanted to use amateur pictures?
A. No.
Q. Did you tell them that you wanted to use professional models?
A. No.
Q. So whose idea was it to use amateur photographs?
A. The - the concept that we went with, part of that concept was using these - the pictures from Flickr.
Q. Okay. That's the concept that you chose and accepted; is that correct?
A. Yes.
Q. And did you personally pick that concept or did you say you picked it in conjunction with Richard?
A. Yes, in conjunction with Rich.
Q. Was - was there anybody else in your department or at Virgin Mobile that assisted you with choosing that concept?
A. To a very small degree, we would have shown a couple of people around the office for their thoughts.
Q. Okay. How did Host present the concepts to you? Did they use images and slogans or did they describe it to you in words? Can you - can you give me an idea of how these concepts were presented for your approval?
A. We'll talk about the concept as the one that we finalised, because I don't know about the other two because I can't remember, but the concept we went ahead with, they - they presented it as a series of

A3 print-outs which were suggested advertisements with a picture and a - a slogan on the top.
Q. Okay. So they presented the images that were ultimately used in the campaign; is that correct?
A. Yes.
Q. And you and Richard and somebody or nobody else at Virgin Mobile looked at those presentations and approved them for use in the campaign; is that correct?
A. Yes.
Q. Okay. Do you know who Alison Chang is?
A. I know of her, yes.
Q. And how do you know of her?
A. I believe she is part of this case, isn't she?
Q. Did you - did you know who she was before this lawsuit was filed?
A. No.
Q. Did you or anyone else at Virgin Mobile make any attempt to contact her before this lawsuit was filed?
A. No.
MR HAWKINS: Object. Form.
BY MR ZEHL:
Q. Do you know if anyone at Virgin Mobile made any attempt to contact her?
A. No, I don't know - sorry, yes, I do know.
Q. Okay.
A. No-one did.
Q. What's your answer - yes - yes, you do know that nobody attempted to contact her or, no, you don't know if anyone attempted to contact her?
A. To the best of my knowledge, I know that nobody tried to contact her.
Q. Okay. Did you or anyone else, to your knowledge, at Virgin Mobile attempt to contact Justin Wong before this lawsuit?
A. I didn't, and I don't believe anybody else did at Virgin Mobile.
Q. When the concept was presented to you, was one of the pictures a picture of Alison Chang?
MR HAWKINS: Object. Form.
THE WITNESS: As it turns out, yes.
BY MR ZEHL:
Q. Okay. And you approved that image for use in the campaign; correct?
A. Yes.
Q. Did you know where those pictures came from?
A. Yes.
Q. And where was that?
A. I believe they came from a - an image-sharing web site called Flickr.
Q. Okay. Have you ever used Flickr before?

A. Me personally?
Q. I'll rephrase. Have you personally ever used Flickr before this lawsuit?
A. No.
Q. Do you - was it your idea to use Flickr to obtain the images?
A. No.
Q. Do you know if it was at - anyone at Virgin Mobile's idea to use Flickr?
A. It wasn't.
Q. Whose idea was it to obtain the pictures from Flickr, do you know?
A. It was part of the - the - the concept, so it was Host's idea.
Q. But didn't you earlier tell me that you presented the general ideas of what you wanted in these campaigns and that they involved pictures of people with opinions - is that right or is that wrong?
MR HAWKINS: I object. Form. Mischaracterises his testimony and argumentative.
THE WITNESS: I didn't say that.
BY MR ZEHL:
Q. Okay. So from the beginning of the - from your first meeting with Host to the launch of the campaign, it's correct to say that concepts were presented to you and you ultimately chose one that used images obtained from Flickr; is that correct?
A. Yes.
Q. Okay. At that time, you had no knowledge that the pictures were being used pursuant to a Creative Commons licence; is that correct?
A. That's correct.
MR HAWKINS: Object. Form.
BY MR ZEHL:
Q. Do you know who downloaded the pictures of the people that were used in the "Are you with us or what?" campaign?
A. I - I know that there were - I know from a - I know - I don't know who - exactly who downloaded each picture, no.
Q. Do you know if the pictures were downloaded by somebody at Virgin Mobile or some - somebody somewhere else?
A. The pictures were downloaded by a company called The Glue Society.
Q. Okay. What is your - what is Virgin Mobile's relationship with The Glue Society?
A. We have no relationship.
Q. Then how did Virgin Mobile end up using pictures that were downloaded by The Glue Society in the

"Are you with us or what?" campaign; do you know?
A. Host had contracted The Glue Society.
Q. Okay. In Mr Bourget's affidavit in support of Virgin Mobile's motion to dismiss he states that Virgin selected the image of Alison Chang from hundreds of millions of available photographs from Flickr; is that correct or incorrect?
A. We didn't select the pictures from Flickr.
Q. So his affidavit is incorrect?
A. I don't think it's --
MR HAWKINS: Object. Form.
THE WITNESS: It's not a hundred per cent clear.
BY MR ZEHL:
Q. Excuse me? What did - can you repeat - you're not 100 per cent clear; is that correct?
A. Marcus's description isn't a hundred per cent clear of exactly what happened.
Q. So is he not qualified to provide his opinions on where the pictures were selected and obtained?
A. I don't know what qualification you need.
Q. Well, for somebody's statement - why - why is the statement not clear, can you tell me?
A. We didn't - we didn't select the pictures from Flickr. We - all we - we chose from a range of advertising - print advertisements that were presented to us.
Q. Do you know how many Flickr images were presented to you in the first concept?
A. All-up, 40. Roughly 40.
Q. And were all 40 of those images used in the campaign?
A. No.
Q. So you selected from the Flickr images that were presented to you; is that correct?
MR HAWKINS: Object. Form. Mischaracterising the evidence.
MR ZEHL: No, that's exactly what he said.
MR HAWKINS: No, again, the image - it's all one page. The images are on one page. There's no separate image.
BY MR ZEHL:
Q. Okay. Can you describe to me how the Flickr images were presented to you?
A. As a series of advertisements with a slogan and a picture and a logo.
Q. Okay. Were all those pictures on one page, the 40 images that you said were presented to you, or were they on separate pages? Can you tell me how they were presented to you?
A. Each advertisement was presented on an A3 piece

of paper with a single image, a slogan and a logo at the bottom.

Q. Okay. Okay. I understand. So is it correct to say that there were approximately 40 eight-by-three pages presented to you if there were 40 images?

A. There were 40 advertisements, approximately.

Q. And how many advertisements were ultimately used in the campaign?

A. Between 17 and 20.

Q. How did you choose the 17 or 20 of the 40?

A. Gut feel.

Q. Okay. Was it - was it your decision, was it Richard's decision or did you both decide which of the 40 advertisements would be used in the campaign?

A. We both decided.

Q. Okay.

MR ZEHL: Now, do you guys mind if we take a five-minute break?

THE VIDEOGRAPHER: Going off the record at 11.21am.

(11.21am)

(Break taken)

(11.40am)

THE VIDEOGRAPHER: Going back on the record at 11.40am. Proceed.

BY MR ZEHL:

Q. Okay. Mr Cain, did you consult with either of the attorneys in the room during this break about the case?

A. Yes.

Q. Okay. What did you talk about?

MR HAWKINS: Don't answer that question. That was some levity by our friend here.

BY MR ZEHL:

Q. Mr Cain, did Virgin contract with Host to assist them with this campaign?

A. We don't have a contract with Host, no.

Q. Have you ever had a contract with Host?

A. No.

Q. So who determines how much you're paying Host and any of the details relating to the projects that they do for you? Are those decided in oral conversations?

A. We have a - a day rate that we pay members of Host, and that's in a - a schedule of fees, and then for a project like this, a campaign, they would present an estimate of how much they thought it would cost.

Q. Okay. And did that estimate include how many hours they anticipated working on it, or was it just based on a project-by-project basis, do you know?

A. The estimates are everything excluding the account management team head hours, so there is a number of people that work on the business ongoing every month, and then when a - a campaign like this comes up, or any campaign, more people might be brought in and there might be other resources that are required and a project estimate would be put - would be - would be presented to us to cover the - those additional costs.

Q. Okay. Do you know how much Virgin paid Host for the "Are you with us or what campaign?"?

A. I would be guessing if I said.

Q. Do you know if it was more than a thousand dollars?

A. Yes, I do know.

Q. Was it more than a thousand dollars?

A. Yes.

Q. So why don't you guess for me what they paid, if you know that it was over a thousand dollars?

A. Okay. I will guess that the project fee would be in the vicinity of $150,000, and we would have paid them approximately 30,000 a month in head hours - that's how much we roughly pay them each month, so --

Q. Is that every month, regardless of whether they're working on a campaign for you, or is it only during the months that they work on the campaign for you that you pay them that 30,000?

A. They do other work that's not campaign based, so - it - it fluctuates between 15 and 60, but average per year is roughly 30 a month.

Q. So would you say that Virgin pays Host every month?

A. We would pay them an amount of money every month, yeah, based on work they would do.

Q. What other work do they do besides campaign work?

A. They run, like --

Q. What other type of work do they do?

A. They facilitate workshops about brand positioning, they undertake research for us, market research, a number of - a number of, yeah, duties similar to that.

Q. Have you worked with Host since the "Are you with us or what?" campaign?

A. Yes.

Q. Okay. Did Host assist you in launching the broadband campaign?

A. Yes.

Q. Okay. What - what does Host do generally when they're helping you with campaigns? What services do they provide to Virgin Mobile?

A. Advertising strategy and creative.

Q. And what do you do in your role as the brand

marketing manager? How is that different than what Host provides to you?
A. I generally brief guidelines for them to come back with strategy and creative.
Q. So you create the guidelines and then they come back with the strategy and the creative?
A. Yeah, I normally - the guidelines - I - yes.
Q. Okay. And then you're ultimately responsible for selecting the campaigns that Virgin Mobile is going to use to promote its products; is that correct?
A. Ultimately, yeah, I'll approve advertising concepts.
Q. Okay. Did you have any communications with anyone at The Glue Society during the "Are you with us or what?" campaign?
A. They were present at meetings, yes.
Q. Were they first present at the initial meeting with Host?
A. Not at the first briefing meeting, no.
Q. Do you know when they started to appear at the meetings?
A. The first meeting they attended was when they presented three concepts.
Q. Okay. And - and was that - did you say that was approximately in January of 2007?
A. That would have been more like getting towards the end of February.
Q. Okay. Did Host get your permission before bringing Glue Society into the project?
A. Yes.
Q. Did you request that Glue Society assist with the project or did anyone else at Virgin Mobile request that Glue Society assist with the project?
A. No.
Q. Have you ever worked with The Glue Society before the "Are you with us or what?" campaign?
A. Yes.
Q. And was it always in conjunction with working with Host?
A. Yes.
Q. Have you or anyone else at Virgin Mobile, to your knowledge, ever personally requested or requested as a corporation that Glue Society assist with a project?
A. Sorry, can you repeat the question?
Q. Has - has Virgin Mobile ever requested that Virgin Mobile [sic] assist with a project in the past, to your knowledge?
A. I can't speak for all of Virgin Mobile.
Q. Anyone in your group, the brand marketing group, to your knowledge?

A. I can't think of an example, but I would say the - there is a chance that yes.

Q. Okay. Are you aware of any contracts or - contracts between Virgin Mobile and any companies that are based in the United States?

A. No.

Q. Do you know if Host has any locations in the United States?

A. I don't know.

Q. Do you know if The Glue Society has any locations in the United States?

A. Yes, I do know.

Q. Do they?

A. Yes.

Q. Okay. Did Virgin Mobile pay The Glue Society for the work that they performed on the project?

A. No.

Q. Did - do you know if Host paid The Glue Society?

A. I assume so, yes.

Q. Okay. Are you aware that the "Are you with us?" campaign won several awards?

A. No. I --

Q. Did the "Are" - did it win any - did the campaign win any advertising awards, to your knowledge?

A. I don't think so, no.

Q. Okay. Do you know - do you know Richard's full name, the former director of the marketing group?

A. The brand general manager? Yeah, Rich Field.

Q. Yes. Do you know his middle name?

A. No. Gerard? No. Don't know. It might start with a "G".

Q. Okay. But you don't know?

A. No.

Q. Do you know if he was from Queenstown?

A. No, he was from South Africa.

Q. Okay. And is he living in South Africa now?

A. Yes.

Q. Okay. Do you know if Richard had a - Rich had a Flickr account?

A. I don't know.

Q. Okay. I'd like to introduce as plaintiff's exhibit number 1 - you may have already marked it, and, if so, then that's fine, this email and print-out from the Flickr web site.

(Exhibit 1 marked for identification)

BY MR ZEHL:

Q. Mr Cain, if you wouldn't mind turning to the second page, I believe at the top it says, "Virgin Mobile - Are you with us or what? / Discuss".

A. Sorry, page what?

Q. I believe at the top it should say "Page 1 of 7", at the top right corner?

A. Yep, I've got that.

Q. Okay. If you would go to the fourth paragraph, saying, "This was never based on exploiting".

A. Mmm-hmm. I can see that.

Q. Okay. And the reason I'm asking you to look - okay, the reason I'm asking you to look at this is because it's a print-out from the Flickr web page, from the Flickr web site, and it was under a topic board called "Are you with us or what?", and this person named "richif", presumptively Richard Fields, says he works with the advertising team at Virgin Mobile and would like to add a few things to the debate. Now, in the fourth paragraph, he says:

> ... we felt it would be a great idea to use the creative commons licence to champion the world of Flickr.

And then three paragraphs below that he says:

> With that in mind we did look into the creative commons licence to ensure that we were acting well within its terms.

Do you know anything about that?

A. About the statements or about this blog or about what he's saying?

Q. Yes, about - about his - about his state - no, about his statements and about using the Creative Commons licence to champion Flickr and looking into the Creative Commons licence.

A. Yeah, so what specifically do you want me to comment on?

Q. Well, did you ever look into using the Creative Commons licence in connection with this campaign?

A. I didn't, no.

Q. It appears that, according to this person who claims to work at the advertising team, somebody did. Do you have any idea who this person could be?

A. Yeah. I imagine that what he's referring to is in the final stages of the campaign that somebody from Host looked into it.

Q. Okay. So - these images, now, were images of people, they were amateur photographs, so you believe that if that's - if what you're saying is true, they launched the campaign and then later worried about the terms of the Creative Commons licence or looked into the Creative Commons licence?

MR HAWKINS: Object. Form.

BY MR ZEHL:

Q. You launched the campaign first and then looked into the terms of the Creative Commons licence; is that

what you're saying?
MR HAWKINS: Object. Form.
THE WITNESS: Yeah, specific - are you saying - yeah, so repeat the question, please? What --
BY MR ZEHL:
Q. From what you're telling me --
A. Mmm-hmm.
Q. Okay. Are you suggesting that Virgin Mobile launched - launched the campaign first and then made sure that it was acting within the terms of the Creative Commons licence, as this - as this email or posting says?
A. No. We would have --
MR HAWKINS: Object. Form.
THE WITNESS: Yeah. No, that's not what I'm saying. We would have had approval to use --
BY MR ZEHL:
Q. So do you - go ahead.
A. We would have asked Host if we were - if we had approval to use the images.
Q. So did you ask Host if you had approval to use the images?
A. Before - before every campaign, before we give the final stamp, we will ensure that we have the rights to use the - any - any material that's in there.

Q. Okay. And did you do that before the "Are you with us or what?" campaign?
A. I didn't do it. It was done.
Q. Did somebody at Virgin Mobile do it in your group?
A. Someone in the brand team would have asked, "Do we have the rights to use the components of these advertising - of these advertisements?".
MR BOURGET: I think we've lost them.
MR ZEHL: Okay. I'm sorry, we lost you. The last that I head was "somebody in the brand team", and then I lost connection.
A. Somebody in the brand team would have asked Host, "Do we have the rights to use the materials in the advertisements?".
Q. Okay. Do you know who that person was in connection with the "Are you with us or what?" campaign?
A. I'm reasonably certain it was Rich.
Q. Okay. So you're reasonably certain that Rich made sure that you had the rights to use the image; is that correct?
MR HAWKINS: Object. Form. You're mischaracterising what he has said.
BY MR ZEHL:
Q. Tell me what you're reasonably certain of, if

you wouldn't mind, please?
A. I'm reasonably certain that Rich said, "Can we - do we have the rights to use these images - these - these - the images, the - the - the - the font." Yeah, any component of the advertisement, he would have said - asked if we were - if we were - had the rights to use it.
Q. And do you think that at that time the Creative Commons licence would have been mentioned to Richard by Host, based on your workings with Host and your past relationships with then?
MR HAWKINS: Object. Form.
THE WITNESS: Yes, I believe that they would have said, yes, that you do have the rights to use the images.
BY MR ZEHL:
Q. Based on the Creative Commons licence?
MR HAWKINS: Object. Form.
THE WITNESS: I can assume that they - they would have said, "Under the Creative Commons licence, you have the rights to use those pictures."
BY MR ZEHL:
Q. Okay. So if that is correct, your assumption, then somebody at Virgin Mobile knew before the campaign that they were using the Creative Commons licence; is that right?
MR HAWKINS: Object. Form.

THE WITNESS: That's - I assume.
BY MR ZEHL:
Q. Okay. On what other basis would they have told you that you had the rights to use the pictures? I mean, what rights are they referring to? I'm assuming you're familiar with the rights relating to pictures, based on your role in the company - are you or are you not?
A. I'm aware, yes.
Q. Okay. So can you describe to me some of the rights that relate to pictures as used in advertising campaigns, based on what you know?
A. If we'd taken the pictures ourselves, we would have got approval from the photographer.
Q. Okay. Would you have - do you need to get - would you have gotten approval from anybody else, or is it just the photographer, if you had taken the pictures yourself?
A. If there was a particular model that we'd paid to use, we would have got a model release as well from them.
Q. If you had not paid the person, would you get their permission to use their image?
A. I've never - I've never used somebody else's picture before. I've always taken them myself.
Q. Did - did Virgin Mobile use the picture of

Alison Chang in this campaign?
A. Yes.
MR HAWKINS: Object. Form.
BY MR ZEHL:
Q. Did they get her permission before using it?
MR HAWKINS: Okay. I'm going to instruct you not to answer that question because that's into the merits of the case.
MR ZEHL: No, it's not at all. It's the contacts with Alison Chang in the United States.
MR HAWKINS: No, you didn't ask him that. You didn't ask him did he contact Alison Chang. But the question you're asking, you're getting into permission, which is going into the merits of the claim. He's not answering that question.
BY MR ZEHL:
Q. Right. Did - did Virgin Mobile seek permission from Alison Chang?
A. No.
Q. Okay. Is there any particular reason why not?
MR HAWKINS: Okay. I'm going to instruct you again not to answer the question. It has nothing to do with jurisdiction and that's the only thing that this witness is being produced for. He's not being produced on the merits of the claim.

BY MR ZEHL:
Q. Okay. Thank you. A couple more questions.
MR HAWKINS: Mr Cain, thank you for your time today.
MR ZEHL: I'm not finished yet. I have a couple more questions.
THE VIDEOGRAPHER: I have five minutes, gentlemen.
MR ZEHL: Okay. We'll be done.
Q. Mr Cain, at the end of the day, who's responsible for using these images in the Flickr - from Flickr and in this campaign?
MR HAWKINS: Again, I'm going to instruct the witness not to answer the question regarding responsibility. That is vague. That is not what will be the ultimate question asked in the trier of fact and that has nothing to do whatsoever with jurisdiction. That goes to the merits of the claim.
MR ZEHL: Okay.
Q. Mr Cain, what attempts did Host make to contact Alison Chang? Do you know of any?
A. I don't know of any.
Q. Did you ask Host before the campaign or do you know if Rich asked Host before the campaign if they had attempted to contact Alison before using the image?
A. I don't know.

Q. Do you know if The Glue Society - or did you ask if The Glue Society attempted to contact Alison before using the image in the campaign?

A. I didn't ask them.

Q. Okay. I don't have any further questions. Thank you, Mr Cain.

MR HAWKINS: Thank you. And the defendant will reserve its questions for the time of trial.

THE VIDEOGRAPHER: Going off the record at 12.03pm. End of tape 1. End of taped deposition of David Cain. Total number of tapes: one.

(Whereupon, the deposition concluded at 12.03pm)

(Off the record the court reporter was requested to mark the Notice of Deposition as exhibit number 2)

CORRECTIONS PAGE

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DEPONENT'S DECLARATION

I, , hereby declare under penalty of perjury under the laws of the United States and the State of Texas that I have read the foregoing transcript and identify it as my own and approve same as a true and correct transcript save and except for changes and/or corrections, if any, as indicated by me on the CORRECTIONS page hereof.

, , ,

Date City State

Signed:

REPORTER'S CERTIFICATE

I, Judith White, of National Court Reporters, Inc. do hereby certify that the foregoing testimony was recorded by me stenographically and thereafter transcribed by me, and that the foregoing transcript constitutes a full, true and accurate record of said examination of and testimony given by said witness, and of all other proceedings had during the taking of said deposition, and of the whole thereof, to the best of my ability.

I further certify that I am not a relative, employee or counsel of any of the parties of the within cause, nor am I an employee or relative of any counsel for the parties, nor am I in any way interested in the outcome of the within cause.

Signed ______________________ Dated ________

(Judith White)

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